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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	

To: The Commission

CONSOLIDATED COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, respectfully submits its Consolidated Comments on the Commission's Second Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 96-438 (released November 7, 1996) ("Second Further Notice"), and on the Commission's Further Notice of Proposed Rule Making in MM Docket No. 94-150, FCC 96-436 (released November 7, 1996). In these Comments, Sinclair demonstrates the following:

1. The clear legislative intent of Section 202(g) of the Telecommunications Act of 1996 (the "Telecom Act") is to grandfather television local marketing agreements ("LMAs") that were in existence as of the Telecom Act's enactment. The Further Notice's proposal with respect to "grandfathering" of LMAs is not grandfathering at all -- it is sunsetting. This is inconsistent with Congressional intent, and the Commission therefore lacks authority to adopt its proposal. LMAs that were in existence as of the enactment of the Telecom Act, as well as LMAs that were in existence as of the adoption of the Further Notice, should be allowed to continue for the full length of time contemplated by the agreement, including all renewals and assignments occurring in accordance with the contract.

2. Under no circumstances should the Commission adopt rules treating either existing or future LMAs as attributable interests unless the Commission relaxes the television duopoly rule to allow ownership of more than one television station in a DMA.

3. With respect to the duopoly rule, the Commission should allow the common ownership of at least two, and up to 50%, of the stations in a DMA, so long as no more than one of the commonly owned stations is VHF. Where a licensee of a VHF station seeks to acquire a second VHF station in the same DMA, it should bear the burden of justifying that the acquisition is in the public interest.

4. The Commission should presumptively waive its one-to-a-market rule and allow in all markets the common ownership of radio and television stations in a single market, where the transaction complies with the radio and television duopoly rules and at least 30 independent voices -- including radio, television, newspapers, cable, and other media outlets -- would remain following the acquisition.

5. The Commission's proposal to treat certain non-attributable equity and debt holdings as attributable interests in some circumstances makes sense -- but only if the Commission relaxes the duopoly rule.

6. Joint sales agreements should not be treated as attributable interests.

Introduction

Sinclair is one of the nation's largest group owners of television stations. It is a publicly-owned company with thousands of shareholders, considerable senior debt obligations, and a market capitalization of in excess of two billion dollars. Sinclair presently owns and operates 13 television stations, and has applications pending to acquire seven more stations (each of which Sinclair is currently programming under time brokerage agreements). In addition, Sinclair provides programming services under Programming Services Agreements (for convenience, these agreements are referred to as "LMAs") to non-owned television stations in six Nielsen DMAs. In five of these DMAs, Sinclair also owns and operates a television station. Moreover, Sinclair owns over twenty radio stations, has applications pending to acquire four more, and sells advertising on a number of other stations under joint sales agreements ("JSAs").

Accordingly, Sinclair has great interest in a number of the issues addressed in the Second Further Notice, which contains proposals regarding television multiple ownership, the grandfathering of television LMAs, and the radio-television cross-ownership (i.e., the "one-to-a-market" rule). Sinclair is also interested in certain of the issues raised in the Further Notice, including the Commission's proposals with respect to attribution of television LMAs, certain equity and debt interests, and JSAs. Because the matters at issue in the Second Further Notice and the Further Notice are often intertwined, Sinclair is filing consolidated comments addressing the issues in both proceedings.

The primary focus of these Comments is on the Commission's proposals regarding television LMAs and television multiple ownership. In a span of over 25 years, Sinclair has evolved from a permittee of a single UHF station in Baltimore, Maryland, to a multibillion-dollar public company operating television stations (primarily UHF) in numerous markets. Sinclair pioneered, and has invested heavily, in the ability to resurrect and revitalize poorly-performing television stations through LMAs. With respect to its own television properties, Sinclair is attempting to compete in a media marketplace that is growing exponentially in competitiveness, owing to, among other things, the expansion of the number of broadcast television stations and networks, the rapid growth of cable as a competitor to broadcast television in its own right, and the introduction of scores of new media technologies including satellite and the Internet. Sinclair thus focuses these Comments on two major points: (i) the Congressionally mandated grandfathering of LMAs that has **not** been provided for in the Second Further Notice; and (ii) the need for the Commission to continue to allow co-market television LMAs in the future, or,

alternatively, relax its antiquated television duopoly rule to allow common ownership of two or more stations in a DMA, so long as only one
is a VHF station. Sinclair then will address several other issues of concern with respect to the "one-to-a-market" rule and attribution.

I. The Commission's Proposal to "Sunset" Rather Than Grandfather Television LMAs Contravenes Congressional Intent and Exceeds the Agency's Authority

Section 202(g) of the Telecom Act provides that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." (Emphasis added). Furthermore, the Conference Report to the Telecom Act plainly states as follows:

> [Section 202(g)] grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment. (Emphasis added).

Black's Law Dictionary, Sixth Edition, defines a "grandfather clause" as a "[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction." Black's Law Dictionary (6th ed. 1990), p. 699. Thus, the plain intent of Congress, as expressed in the Conference Report, is to allow parties engaged in television LMAs to continue engaging in television LMAs notwithstanding any changed regulation that might prevent the LMA. This is entirely consistent with the language of Section 202(g) itself. The statutory provision expressly allows the "continuation" and the "renewal" of any television LMA "that is in compliance with the rules of the Commission." Since the Telecom Act was enacted on February 8, 1996, and since television LMAs were permissible at the time (and, indeed, continue to be permissible), the Telecom Act by its plain language allows LMAs in effect as of February 8, 1996, not only to be continued, but to be renewed.

The proposal for the "grandfathering" of television LMAs that the Commission advances in the Second Further Notice bears no resemblance to what Congress intended by drafting Section 202(g) of the Telecom Act. As noted above, Congress intended Section 202(g) to "grandfather" LMAs in existence upon enactment of the Telecom Act. Under its recognized definition, "grandfathering" means allowing such LMAs to continue to be performed despite a future regulation that might not allow them. The Second Further Notice proposal, however, is designed not to allow television LMAs to continue, but to phase them out. Specifically, the Commission -- in disregard of Congressional intent and of the statutory language (which permits "continuation" and "renewal" of pre-Telecom Act enactment LMAs) -- has proposed to "grandfather" all LMAs in effect prior to November 5, 1996 -- including LMAs that were in effect as of February 8, 1996 -- only for their original terms. If rules are adopted in MM Docket No. 91-221 that make television LMAs attributable, an LMA that existed prior to November 5, 1996 could not be assigned, or even renewed, if the LMA created a multiple ownership violation under the new rules. Moreover, LMAs entered into after November 5, 1996 would not be grandfathered, and would have to be terminated within a short period of time if the Commission adopts rules that place such LMAs in violation of the multiple ownership restrictions.

The Commission's proposal represents sunsetting of LMAs, not grandfathering. As to pre-February 8, 1996 LMAs, the Commission's proposal to "grandfather" such LMAs only for one term patently contravenes the statutory language of Section 202(g) of the Telecom Act, which expressly provides for "continuation" and "renewal" of LMAs then in effect. It also disregards the language of the Conference Report. The Conference Report states simply that LMAs in effect upon enactment of the legislation are "grandfathered" -- not that they are grandfathered until the end of one term or until they are assigned. Furthermore, the language of Section 202(g) permits both the "continuation" and "renewal" of LMAs "that [are] in compliance with the regulations of the Commission." Since television LMAs are "in compliance with the regulations of the Commission" now, and will be until the Commission adopts rules that might place certain LMAs out of compliance, any effort by the Commission to prohibit the continuation and renewal of any LMA that is in effect before the rule change violates the terms of the statute.

The Commission, however, has proposed not only to "grandfather" only for one term or until assignment all LMAs in effect prior to the Commission's handpicked November 5, 1996 date, but to require the immediate termination of LMAs entered into between November 5, 1996 and the date the Commission adopts new rules -- even though such LMAs now are unquestionably legal. If the Commission adopts the "grandfathering" proposal set forth in the Second Further Notice, it will have acted in flagrant disregard of both the language of the Telecom Act and the legislative history that underlies it. The Commission has been down this path before. The interconnection rules that the Commission adopted to implement the Telecom Act drew the wrath of members of Congress -- and ultimately a court stay of the rules' effectiveness -- for being directly contrary to what the legislators intended. The Commission should avoid straying down this path again.

The "grandfathering" proposal set forth in the Second Further Notice is not only bad law, it is bad policy. As demonstrated by the Conference Report, the Telecom Act's conferees "note[d] the positive contributions of television LMAs." Unfortunately, the Commission has not followed suit. In its apparent conviction that LMAs represent a means for "end-running" the television duopoly rule, the Commission has failed to recognize the fact that LMAs have benefited, and continue to benefit, the public by rescuing television stations that are failing, revitalizing stations that are performing poorly, enhancing stations' offerings of news, public affairs, and children's programming, and improving stations' ability to make outreach efforts into their communities. Sinclair's experience with LMAs is illustrative. Consider the following:

* In May 1995, Sinclair entered into an LMA with station WABM(TV), Birmingham, Alabama. At the time, WABM(TV) was in bankruptcy and was unable to purchase programming product because of its poor financial state. All of the shows that aired were barter shows, and, in the course of a day, it was not unusual to see a show three times in one day. Now, WABM(TV) is a UPN affiliate. It airs first-run and top syndicated programs throughout the broadcast day. As of the third quarter of 1996, WABM(TV) was airing 6½ hours of core children's programming per week. WABM(TV) has gone from a 0/0 ratings/share in May 1994 to a 1/3 ratings/share in November 1996. Moreover, WABM has been able to engage in public service and outreach projects to its service area that it could never have undertaken before.

* In May 1994, Sinclair entered into an LMA with station WNUV-TV, Baltimore, Maryland. Before the LMA, WNUV-TV was only a marginally profitable station. It was running tired programming, and its community involvement essentially consisted of airing public service announcements. However, in April 1997, WNUV-TV plans to begin a 6:30 p.m. local newscast -- the latest evening news of any station in the market. As of the third quarter of 1996, WNUV-TV's core children's programming amounted to 6½ hours per week. The station engaged in five community service projects in 1996 (including an African-American history salute and a legal aid campaign), and is targeting a minimum of six such projects for 1997. WNUV-TV has also won the rights to preseason Baltimore Ravens football games.

* In December 1991, Sinclair entered into an LMA with station WPTT(TV), Pittsburgh, Pennsylvania. Before the LMA, WPTT(TV) was a home shopping station operating on a marginal basis. As a result of the LMA, WPTT(TV) has become profitable. WPTT(TV) has expanded its entertainment programming each year to the point where it is now airing 20 hours per day. Through the LMA, WPTT(TV) has been able to secure better syndicated programming. In addition, the station has strengthened its lineup of children's programming. As of the third

quarter of 1996, WPTT(TV) aired 4½ hours of core children's programming per week. This year, WPTT(TV) has won the rights to broadcast 12 hockey games. The station's ratings/share has gone from 0/0 to 1/3 since the LMA began.

* In March 1995, Sinclair entered into an LMA with station WRDC(TV), Durham, North Carolina. Formerly, WRDC(TV) aired very little local public affairs programming. Now, the station has a public affairs director and has conducted highly successful "Toys for Tots" campaigns in 1995 and 1996. The LMA has also allowed WRDC(TV) to improve its children's programming. The station has recently added three children's programs and produces local segments for one of its children's shows.

* In March 1993, Sinclair entered into an LMA with station WVTV(TV), Milwaukee, Wisconsin. Prior to the LMA, WVTV(TV) was barely breaking even. Now, it has become profitable. WVTV(TV) is now able to draw upon an extensive movie library, and has acquired the rights to popular programming such as "Seinfeld," "Martin," "Living Single," "Frasier," "Friends," and "Family Matters," and it has increased its children's programming from ½ hour a week in 1993 to 4½ hours a week in 1996. Moreover, WVTV(TV) has been able to add 68 Milwaukee Brewers baseball games and 35 Milwaukee Bucks games to its schedule. In February 1993, before the LMA, WVTV(TV)'s ratings/share was 0/0. In February 1996, it was 3/7.

Additionally, five of Sinclair's LMAs are with companies controlled by an African-American individual. By its LMA arrangements, therefore, Sinclair has helped further the Commission's decades-old goal of introducing minorities into ownership and active participation in the broadcast industry.

Finally, as Sinclair has stated in its previous comments in MM Docket No. 91-221, television LMAs generally do not involve duplication of programming. In those markets where Sinclair both owns a station and programs one via an LMA, the two stations have separate network affiliations and duplicate little or none of their programming. For the Commission to conclude that LMAs somehow impede the diversity of programming to the viewing public would be a mistake.

Adoption of the Commission's proposal to "sunset" rather than grandfather LMAs would not only harm the viewing public, it would also harm financial institutions and public shareholders who have invested funds in the television industry in reliance on the fact that the Commission's rules permit LMAs. Banks have loaned money, and institutions and individuals have invested in public media companies, in the expectation that the LMAs into which those companies have entered would enhance cash flow over the full life of the contractual agreement. To suddenly cut LMAs short by regulatory fiat would cause a financial dislocation of the television industry that would harm investors and lenders and hinder broadcasters, who are already struggling to compete against cable and other media competitors with multiple revenue streams.

In short, the Commission's proposal to "grandfather" pre-November 5, 1996 LMAs only for their initial terms and require quick termination of post-November 5, 1996 LMAs violates the language and intent of the Telecom Act, ignores the many public interest benefits that LMAs provide, and would cause considerable economic harm to the broadcast television industry. To avoid a probable court challenge and avoid doing damage to viewers and broadcasters alike, the Commission must act consistently with its statutory mandate and fully grandfather all television LMAs which are in existence on the effective date of such rules as are adopted in the instant rulemaking proceedings. This grandfathering should encompass the full length of the LMA as contemplated by the particular agreement, including all renewals and assignments that are permitted by the contract.

II. If the Commission Adopts Its Proposal to Treat Television LMAs as Attributable Interests, It Must Relax the Duopoly Rule

The Further Notice in the attribution proceeding expresses the Commission's tentative conclusion that television LMAs should be treated similarly to radio LMAs for attribution purposes. Specifically, the Commission proposes to adopt rules providing that time brokerage of a television station by another television station in the same market would be deemed an attributable interest, and would therefore count toward the brokering television licensee's national and local ownership limits. However, if the Commission is intent on adopting this proposal, it can only expand market opportunities in the television context -- and carry out the will of Congress -- by coupling its approach with a substantial relaxation of the antiquated multiple ownership restrictions on television broadcasters. Sinclair's suggestions regarding revisions to the television duopoly rule are discussed below.

III. The Duopoly Rule Should Be Relaxed Substantially

Sinclair is a member of the Local Station Operators Coalition ("LSOC"). The comments of LSOC being filed today in this proceeding demonstrate in detail the need to substantially relax the television duopoly rule. LSOC describes in detail the explosion of new media enterprises, and the growth of existing ones, all of which have emerged as formidable competitors to television broadcasters. Many of these competitors provide multiple channels of programming and derive revenue from multiple streams. For example, two networks, ABC and NBC, which themselves control about 75% of the programming distributed to their affiliates, also offer ESPN, ESPN2 and MSNBC, respectively. The time has come for the Commission to allow small television broadcasters which do not have the capital base to form a cable network to compete with their multi-channel rivals by modifying the antiquated rule allowing ownership of only one station in a market.

Sinclair supports LSOC's position that the Commission abandon consideration of television multiple ownership based on contour overlap and use the most current reliable measure of a television market -- the DMA -- as the sole definition of a station's market. Furthermore, Sinclair believes that LSOC's proposal to allow the common ownership of two television stations in a market, provided one of the stations is a UHF station, should be the minimum extent to which the Commission relaxes its television duopoly rule.

Indeed, Sinclair believes that the duopoly rule can and should be modified to allow a single operator to own up to 50% of the television stations assigned to a given DMA, provided that no more than one of the stations is a VHF station. As LSOC shows in its comments, common ownership of two stations in the same market, regardless of market size, would pose no threat to local market competition and diversity, so long as no more than one of the stations is VHF. In larger DMAs with six or more commercial television stations, Sinclair sees no reason why diversity or competition should be any more of a concern if a broadcaster owned a third television station, or a fourth station in an 8+ station DMA, so long as no more than one of the commonly owned stations is a VHF station. Notably, in the radio context the Commission permits a single entity to own up to 50% of the radio stations in the smallest markets. And as in radio, antitrust enforcement authorities (the Department of Justice and the Federal Trade Commission) have the authority to address and remedy concerns about potential diminution of competition in a particular market.

In short, Sinclair believes that the Commission should modify its duopoly rule to provide television broadcasters with maximum flexibility to compete in the local and national media marketplaces. The Commission should do so by permitting broadcasters to own up to 50% of the television stations assigned to a DMA -- provided that no more than one of the commonly owned stations is a VHF station. As for VHF/VHF duopoly, analog VHF stations have enjoyed so much entrenched power in their markets for so many years that common ownership of two or more VHF stations should not be presumptively permitted. Consistent with the Telecom Act, applicants seeking to own two VHF stations in a DMA should have a steep burden of proving that such common ownership is in the public interest.[1]

IV. The Commission Should Utilize a 30-Minimum Voice Test for Presumptive One-to-a-Market Waivers in All Markets

Presently, the Commission presumptively grants waivers of its one-to-a-market rule to permit the common ownership of one TV station, one AM station, and one FM station in a single market where (i) the pertinent television market is in the top 25; and (ii) a minimum of 30 independently owned broadcast voices would remain after the acquisition. The Telecom Act directs the Commission to extend this presumptive waiver policy to the top 50 television markets. Given the proliferation of media outlets that compete with broadcasters, however, the relief mandated by the Telecom Act is not nearly sufficient to give broadcasters sufficient freedom to meaningfully compete in the media marketplace. Indeed, due to Congress' recognition of this fact in the Telecom Act, common ownership of up to five radio stations is

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1/ Once the transition to digital television ("DTV") occurs, most television stations will broadcast in the UHF band. However, former VHF stations moving to the UHF DTV band ("VHF/UHF stations") will likely continue to have significant advantages over their "UHF/UHF" competitors in terms of coverage area and operating power close within their transmitter sites. See Comments of Sinclair in MM Docket No. 87-268 (filed January 24, 1997). Thus, for the purposes of its multiple ownership rules, the Commission should maintain a "VHF/UHF" vs. "UHF/UHF" distinction until actual operational experience in the DTV environment proves otherwise.

permitted in even the smallest markets. Yet under the present policy, an owner of a television and a radio station in a market who wishes to acquire even a second radio station -- let alone a third, fourth, fifth, and above -- must expend time and resources preparing a "case-by-case" waiver request, and then wait while the Commission expends its time and resources reading and considering the request and drafting an item disposing of it. To the best of Sinclair's knowledge, the Commission has granted all of the case-by-case one-to-a-market waiver requests with which it has been presented since the Telecom Act was enacted. Thus, the Commission has apparently recognized that the public interest is served by allowing radio/television combinations that comply with the individual restrictions on radio and television ownership.

Sinclair believes that the Commission should simplify its presently cumbersome waiver policy and presumptively grant one-to-a-market waiver requests in all markets as long as: (i) the combination complies with the restrictions of the radio and television duopoly rules; and (ii) at least 30 independent media voices would remain in the market following the consummation of the proposed acquisition. Furthermore, in counting the media voices in the market, the Commission should not limit its consideration to only radio and television stations. As LSOC's comments show in detail, television and radio stations compete with each other and with all forms of other media, including newspapers, cable television, DBS, and other emerging new technologies.

V. The Commission Should Adopt Its "Equity or Debt Plus" Proposal, But Only if the Television Duopoly Rule Is Relaxed

In its Further Notice concerning attribution, the Commission advances a proposal by which it would attribute otherwise nonattributable debt or equity interests in a licensee where: (i) the interest holder is a program supplier to the licensee or a same-market broadcaster (or other media outlet subject to the cross-ownership rules); and (ii) the debt or equity holding exceeds 33% or some other specified threshold. Sinclair does not disagree with the Commission's proposal, insofar as it would encompass the sorts of complex, multiple-relationship deals created by networks and other major media organizations that properly should count against such entities' compliance with the national ownership cap.[2/] Like the Commission's proposal to attribute television LMAs, however, the "equity or debt plus" proposal should not be adopted unless it is accompanied by a substantial relaxation of the television duopoly rule.

VI. Joint Sales Agreements Should Not Be Treated as Attributable Interests of the Selling Station

Finally, the Further Notice requests comment on whether JSAs should be treated as attributable interests of the licensee performing the selling. Sinclair believes that they should not. The customary JSA involves only the selling of advertising time on the "sold" station and the sharing of sales staff, accounting, and other "back office" functions. Normally, a JSA involves no provision of programming.

In the 1980s, the Commission correctly decided that issues of joint sales practices between stations should be left to antitrust enforcement authorities, and repealed its policies addressing joint sales practices. There is no reason for the Commission to reverse that determination. Because JSAs do not usually include programming, they present no diversity concerns, and any concerns about concentration of power in a particular advertising market should be left for determination by antitrust authorities. Thus, the Commission should continue

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[2/] See, e.g., the transactions described in paragraph 18 and footnotes 27-30 of the Further Notice.

its approach of not treating JSAs as attributable interests, unless a JSA provides for, or is accompanied by, a time brokerage arrangement.

Conclusion

For the reasons set forth above, Sinclair urges the Commission to adopt the television multiple ownership and attribution proposals outlined in these consolidated Comments.

Respectfully submitted,

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Dated: February 7, 1997

CERTIFICATE OF SERVICE

I, Deniece Mayberry, a secretary for the law firm Fisher Wayland Cooper Leader & Zaragoza, L.L.P., hereby certify that a copy of the foregoing Consolidated Comments of Sinclair Broadcast Group, Inc. was delivered to the foregoing persons via hand-delivery this the 7th day of February, 1997.

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